

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KENDELL MURPHY §
v. § CIVIL ACTION NO. 6:10cv508
BARRY S. ANDREWS, ET AL. §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
ON THE PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

The Plaintiff Kendell Murphy, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Murphy has filed a motion for default judgment, but the records of the case show that the Defendants' answer was filed within 30 days of the date of receipt of the order to answer. Murphy's motion for default was signed one day before the answer was filed and apparently crossed in the mail with this answer.

The Magistrate Judge issued a Report recommending that the motion for default judgment be denied. Murphy filed objections to this Report, contending that the Defendants did not answer within 30 days after the Magistrate Judge signed the order to answer.

This order to answer was signed on April 1, 2011, and was received by the Defendants on April 4. The answer was filed 28 days after the order to answer was received by the Defendants, which is within the time period set out in the order. The Magistrate Judge correctly

determined that the Defendants were not in default, and that there is a preference for resolving cases on the merits rather than by default judgment. Murphy's objections are without merit.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the Plaintiff's motion for default judgment, the Report of the Magistrate Judge, and the Plaintiff's objections thereto. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Report of the Magistrate Judge (docket no. 51) is ADOPTED as the opinion of the District Judge. It is further

ORDERED that the Plaintiff's motion for a default judgment (docket no. 46) be and hereby is DENIED.

It is SO ORDERED.

SIGNED this 23rd day of January, 2012.



MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE